Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

10 May 2016*

(State aid — Renewable energy — Aid granted by certain provisions of the amended German law concerning renewable energy sources (EEG 2012) — Aid supporting renewable electricity and reduced EEG surcharge for energy-intensive users — Decision declaring the aid partially incompatible with the internal market — Concept of State aid — Advantage — State resources)

In Case T-47/15,

Federal Republic of Germany, represented initially by T. Henze and K. Petersen, and subsequently by T. Henze and K. Stranz, acting as Agents, and by T. Lübbig, lawyer,

applicant,

v

European Commission, represented initially by T. Maxian Rusche and R. Sauer, and subsequently by T. Maxian Rusche and K. Herrmann, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for the annulment of Commission Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users) (OJ 2015 L 250, p. 122),

THE GENERAL COURT (Third Chamber),

composed of S. Papasavvas (Rapporteur), President, E. Bieliūnas and I.S. Forrester, Judges,

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written part of the procedure and further to the hearing on 21 January 2016,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 In December 2011 the Bund der Energieverbraucher (German Association of Energy Consumers) lodged a complaint with the European Commission in which it contended that certain measures laid down by the Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus Erneuerbaren Energien (Law revising the legal framework for the promotion of electricity production from renewable energy) of 28 July 2011 (BGBl. 2011 I, p. 1634; 'the EEG 2012'), which was to enter into force on 1 January 2012, constituted aid incompatible with the internal market.

Measures at issue

2 The EEG 2012 has the aim of protecting the climate and the environment by ensuring the sustainable development of energy supply, reducing the cost of energy supply for the German economy, relieving fossil energy sources and developing technologies for the production of electricity from renewable energy sources and mine gas ('EEG electricity'). To that end, it seeks in particular to increase renewable energy's share of electricity supply to a minimum of 35% in 2020 and then, in successive stages, to a minimum of 80% in 2050 (Paragraph 1 of the EEG 2012).

3 In that context, the EEG 2012 lays down in particular a scheme to support producers of EEG electricity (Paragraph 2 of the EEG 2012), the main characteristics of which are described below.

4 In the first place, network operators at all voltage levels ('NOs') ensuring the general supply of electricity are required (i) to connect installations producing EEG electricity within their area of activity to their network (Paragraphs 5 to 7 of the EEG 2012), (ii) to feed that electricity into their network, transmit it and distribute it by way of priority (Paragraphs 8 to 12 of the EEG 2012) and (iii) to make to the operators of those installations a payment that is calculated on the basis of tariffs laid down by law, in the light of the nature of the electricity at issue and the rated or installed capacity of the installation concerned (Paragraphs 16 to 33 of the EEG 2012). Alternatively, operators of installations producing EEG electricity are entitled, first, to sell all or part of that electricity directly to third parties and, secondly, to require the NO to which the installation would have been connected but for such direct sale to pay them a market premium calculated on the basis of the amount that would have been payable had the installation been connected (Paragraphs 33a to 33i of the EEG 2012). In practice, it is not in dispute that those obligations are borne essentially by local low or medium-voltage distribution system operators ('DSOs').

5 In the second place, the DSOs are required to transmit the EEG electricity to the interregional upstream operators of high and very-high-voltage transmission systems ('TSOs') (Paragraph 34 of the EEG 2012). As consideration for that obligation, the TSOs are required to pay the DSOs the equivalent of the payments and market premiums received by installation operators from the DSOs (Paragraph 35 of the EEG 2012).

6 In the third place, the EEG 2012 provides for a 'nationwide compensation mechanism' in respect of, first, the quantities of EEG electricity which each TSO feeds into its network and, secondly, the sums paid by way of consideration to the DSOs (Paragraph 36 of the EEG 2012). In practice, each TSO that has fed in and paid for a quantity of EEG electricity greater than the quantity provided by electricity suppliers to final customers located in its area may claim, in regard to the other TSOs, an entitlement to compensation corresponding to that difference. Since the years 2009-10, the compensation no longer takes place in actual form (exchange of EEG electricity flows) but in financial form

(compensation of the related costs). Three of the four TSOs concerned by that compensation mechanism are private undertakings (Amprion GmbH, TenneT TSO GmbH and 50Hertz Transmission GmbH), whilst the fourth is a public undertaking (Transnet BW GmbH).

7 In the fourth place, the TSOs are required to sell the EEG electricity which they feed into their network on the spot market of the electricity exchange (Paragraph 37(1) of the EEG 2012). If the price thereby obtained does not enable them to cover the financial burden imposed upon them by the statutory obligation to pay for that electricity at the rates laid down by law, they are entitled, under the conditions laid down by the legislative authorities, to require the suppliers to the final customers to pay them the difference, in proportion to the quantities sold. This mechanism is called the 'EEG surcharge' (Paragraph 37(2) of the EEG 2012). The amount of the EEG surcharge may nevertheless be reduced by EUR 0.02 per kilowatt hour (kWh) in certain cases (Paragraph 39 of the EEG 2012). In order to obtain such a reduction, referred to by the EEG 2012 as a 'reduction of the EEG surcharge', but also known as the 'green electricity privilege', electricity suppliers must in particular demonstrate (i) that at least 50% of the electricity that they deliver to their customers is EEG electricity, (ii), that at least 20% of that electricity is derived from wind or solar radiation energy and (iii) that the electricity is sold directly to their customers.

8 The detailed rules governing the EEG surcharge were specified, in particular, in the Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus (regulation developing further the nationwide compensation mechanism) of 17 July 2009 (BGBl. 2009 I, p. 2101), as amended by Article 2 of the Gesetz zur Änderung des Rechtsrahmens für Strom aus solarer Strahlungsenergie und zu weiteren Änderungen im Recht der erneuerbaren Energien (Law amending the legal framework for electricity from solar radiation and further amending legislation governing renewable energy) of 17 August 2012 (BGBl. 2012 I, p. 1754), and in the Verordnung zur Ausführung der Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus (regulation implementing the regulation developing further the nationwide compensation mechanism) of 22 February 2010 (BGBl. 2010 I, p. 134), as amended by the Zweite Verordnung zur Änderung der Ausgleichsmechanismus-Ausführungsverordnung (second regulation amending the implementing regulation on the compensation mechanism) of 19 February 2013 (BGBl. 2013 I, p. 310).

9 In the fifth place, it is not in dispute that, although the EEG 2012 does not oblige electricity suppliers to pass the EEG surcharge on to the final customers, it does not prevent them from doing so either. Nor is it in dispute that the suppliers, which are themselves obliged to pay the surcharge to the TSOs, in practice pass it on to their customers, as the Federal Republic of Germany indeed confirmed at the hearing. The manner in which the surcharge is to be shown on the bill sent to customers is prescribed by the EEG 2012 (Paragraph 53 of the EEG 2012), as are the conditions under which customers must be informed of the proportion of renewable energy subsidised under the Law on renewable energy that is supplied to them (Paragraph 54 of the EEG 2012).

10 In addition, the EEG 2012 lays down a special compensation scheme, under which the Bundesamt für Wirtschaft und Ausfuhrkontrolle (Federal Office for Economic Affairs and Export Control; 'the BAFA') each year caps the amount of the EEG surcharge that may be passed on by electricity suppliers to two specified categories of customers — namely, first, 'electricity-intensive undertakings in the manufacturing sector' ('EIUs') and, secondly, 'railways' — following a request which must be submitted by them by 30 June of the previous year, with the aim of reducing their electricity costs and, in so doing, of maintaining their competitiveness (Paragraph 40 of the EEG 2012).

11 The EEG 2012 specifies the conditions for qualifying for that scheme, the procedure that must be followed by eligible undertakings, the detailed rules for determining the cap on a case-by-case basis and the effects of decisions adopted in this connection by the BAFA (Paragraphs 41 to 44 of the EEG 2012). The EEG 2012 provides in particular that, for undertakings in the manufacturing sector whose electricity consumption costs represent at least 14% of their gross value added and whose consumption is at least 1 gigawatt hour (GWh), the cap is set at 10% of the EEG surcharge for the

part of their consumption between 1 GWh and 10 GWh, at 1% of that surcharge for the part of their consumption between 10 GWh and 100 GWh, and at EUR 0.0005 per kWh above that. The EEG 2012 also provides that, for undertakings in the manufacturing sector whose electricity consumption costs represent at least 20% of their gross value added and whose consumption is at least 100 GWh, the EEG surcharge is capped at EUR 0.0005 per kWh from the first kilowatt hour. The EEG 2012 further states that electricity suppliers must inform undertakings that have received a notice capping the EEG surcharge (i) of the proportion of renewable energy benefiting from aid under the Law on renewable energy that is supplied to them, (ii) of the composition of their overall energy mix and (iii), for undertakings which are supported pursuant to the Law on renewable energy, of the composition of the energy mix that is provided to them (Paragraph 54 of the EEG 2012).

12 In the sixth place, the EEG 2012 contains a set of obligations requiring the provision of information and publication that are imposed on operators of installations, NOs and electricity suppliers, in particular vis-à-vis TSOs and the Bundesnetzagentur (Federal Networks Agency; 'the BNetzA'), as well as a series of transparency obligations owed specifically by TSOs (Paragraphs 45 to 51 of the EEG 2012). That law also specifies the powers of supervision and control that the BNetzA possesses in respect of DSOs and TSOs (Paragraph 61 of the EEG 2012).

Decision to initiate the formal investigation procedure

13 By letter of 18 December 2013, the Commission informed the German authorities that it had decided to initiate the formal investigation procedure in respect of the measures contained in the EEG 2012 and implemented in the form of aid supporting renewable electricity and energy-intensive users.

14 By application lodged at the Registry of the General Court on 28 February 2014, the Federal Republic of Germany brought an action for annulment of the decision to initiate the formal investigation procedure, an action which it withdrew by letter of 28 April 2015.

15 By order of 8 June 2015, the President of the Third Chamber of the General Court ordered that the case be removed from the Court's register (*Germany* v *Commission*, T-134/14, not published, EU:T:2015:392).

Contested decision

16 On 25 November 2014 the Commission adopted Decision (EU) 2015/1585 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users) (OJ 2015 L 250, p. 122; 'the contested decision').

17 First, the Commission considered that the feed-in tariffs and market premiums, which guarantee producers of EEG electricity a higher price for the electricity they produce than the market price, constitute State aid compatible with the internal market. Secondly, it considered that the reduction of the EEG surcharge for certain energy-intensive users also constitutes State aid, the compatibility of which with the internal market is recognised only if it falls into certain categories.

18 The operative part of the contested decision reads as follows:

'*Article 1*

The State aid for the support of electricity production from renewable energy sources and from mine gas, including its financing mechanism, granted on the basis of the Erneuerbare-Energien-Gesetz 2012 …, unlawfully put into effect by Germany in breach of Article 108(3) [TFEU], is compatible with the internal market subject to the implementation of the commitment set out in Annex I by Germany.

…

Article 3

1. The State aid consisting of reductions in the surcharge for the funding of support for electricity from renewable sources … in the years 2013 and 2014 for energy-intensive users …, unlawfully put into effect by Germany in breach of Article 108(3) [TFEU], is compatible with the internal market if it falls into one of the four categories set out in this paragraph.

Where the State aid was granted to an undertaking which belongs to a sector listed in Annex 3 to the Guidelines on State aid for environmental protection and energy 2014-20 …, it is compatible with the internal market if the undertaking paid at least 15% of the additional costs faced by electricity suppliers due to obligations to buy renewable energy which are subsequently passed on to their customers. If the undertaking paid less than 15% of those additional costs, the State aid is nevertheless compatible if the undertaking paid an amount that corresponds to at least 4% of its gross value added or, for undertakings having an electro-intensity of at least 20%, at least 0.5% of gross value added.

Where the State aid was granted to an undertaking which does not belong to a sector listed in Annex 3 to the 2014 Guidelines but had an electro-intensity of at least 20% in 2012 and belonged, in that year, to a sector with a trade intensity of at least 4% at Union level, it is compatible with the internal market if the undertaking paid at least 15% of the additional costs faced by electricity suppliers due to obligations to buy renewable energy which were subsequently passed on to electricity consumers. If the undertaking paid less than 15% of those additional costs, the State aid is nevertheless compatible if the undertaking paid an amount that corresponds to at least 4% of its gross value added or, for undertakings having an electro-intensity of at least 20%, at least 0.5% of gross value added.

Where the State aid was granted to an undertaking eligible for compatible State aid on the basis of the second or third subparagraph, but the amount of the EEG surcharge paid by that undertaking did not reach the level required by those subparagraphs, the following parts of the aid are compatible:

(a) for 2013, the part of the aid which exceeds 125% of the surcharge that the undertaking actually paid in 2013;

(b) for 2014, the part of the aid which exceeds 150% of the surcharge that the undertaking actually paid in 2013.

Where the State aid was granted to an undertaking not eligible for compatible State aid on the basis of the second or third subparagraph, and where the undertaking paid less than 20% of the additional costs of the surcharge without reduction, the following parts of the aid are compatible:

(a) for 2013, the part of the aid which exceeds 125% of the surcharge that the undertaking actually paid in 2013;

(b) for 2014, the part of the aid which exceeds 150% of the surcharge that the undertaking actually paid in 2013.

2. Any aid that is not covered by paragraph 1 is incompatible with the internal market.'

Procedure and forms of order sought

19 By application lodged at the Registry of the General Court on 2 February 2015, the Federal Republic of Germany brought the present action.

20 The Federal Republic of Germany claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the action;

— order the Federal Republic of Germany to pay the costs.

Law

22 In support of its action, the Federal Republic of Germany puts forward three pleas, alleging, in essence, (i) that there were manifest errors of assessment in the evaluation of the facts, (ii) that there is no advantage linked to the special compensation scheme and (iii) that there is no advantage financed through State resources.

First plea: manifest errors of assessment in the evaluation of the facts

Admissibility

23 Without formally raising an objection of inadmissibility pursuant to Article 130 of the Rules of Procedure of the General Court, the Commission puts forward as its principal submission that the first plea is inadmissible, essentially on the ground that it is incomprehensible.

24 The Commission contends that, in its description of the subject matter of the plea, the Federal Republic of Germany criticises the Commission generally for having manifestly misunderstood the various forms of State action, a criticism which in the Commission's submission is incomprehensible. The Commission adds that the General Court does not have the task of reinterpreting an incomprehensible line of argument in the application so as to give it a meaning.

25 It should be recalled that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, which is applicable to the procedure before the General Court in accordance with the first paragraph of Article 53 thereof, and Article 76(d) of the Rules of Procedure, all applications must contain the subject matter of the dispute and a summary of the pleas in law relied on. Irrespective of any question of terminology, that information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary without any further information. In order to guarantee legal certainty and the sound administration of justice it is necessary, if an action is to be admissible under the aforementioned provisions, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (see order of 28 April 1993 in *De Hoe* v *Commission*, T-85/92, EU:T:1993:39, paragraph 20 and the case-law cited).

26 More specifically, whilst it should be acknowledged, first, that the statement of the pleas in the application need not conform with the terminology and layout of the Rules of Procedure and, secondly, that the pleas may be expressed in terms of their substance rather than of their legal classification, the application must nonetheless set out those pleas with sufficient clarity. Moreover, a mere abstract statement of the pleas in the application does not satisfy the requirements of the Statute of the Court of Justice of the European Union and the Rules of Procedure and the expression

'brief statement of the pleas in law' or 'summary of [the] pleas in law' used therein means that the application must specify on what grounds the action is based (see order of 28 April 1993 in *De Hoe* v *Commission*, T-85/92, EU:T:1993:39, paragraph 21 and the case-law cited).

27 In the present case, it is apparent from the application that the subject matter of the first plea is clearly defined, in that it seeks the annulment of the contested decision, and that it alleges manifest errors of assessment in the evaluation of the facts and of the State's role in the operation of the EEG 2012. It is also apparent from the application that, by this plea, the Federal Republic of Germany submits, in essence, that the contested decision infringes Article 107(1) TFEU, so that the application sets out the plea with sufficient clarity.

28 It follows that the plea of inadmissibility must be dismissed as unfounded.

Substance

29 The Federal Republic of Germany submits, in essence, that the contested decision infringes Article 107(1) TFEU in that the Commission committed various manifest errors of assessment in its evaluation of the State's role in the operation of the EEG 2012. The Federal Republic of Germany contends that the State does not perform a particular role and is not involved in the operation of the EEG 2012.

30 In the first place, as regards the parties that are involved in the system under the EEG 2012, the Federal Republic of Germany submits, first, that only entities governed by private law participate in the mechanism under the EEG 2012, secondly, that that law is applicable without distinction to (i) public network or system operators and public electricity suppliers and (ii) their private equivalents, thirdly, that no individual undertaking is entrusted with particular tasks by the EEG 2012 or its implementing regulations, but only the TSOs taken together, and fourthly, that the State bodies which are conferred powers by the EEG 2012 have as their sole task monitoring the legality and the proper operation of the mechanisms established, without having any influence on the origin and use of the resources generated.

31 In the second place, the Federal Republic of Germany contends that the financial flows generated by operation of the EEG 2012 are neither imposed nor controlled by the State. It maintains in support of this contention (i) that the EEG 2012 is a scheme setting the price for the production of electricity from renewable energy that does not enable the State to set the amount of the EEG surcharge, which is determined by the parties in the context of their contractual freedom, and (ii) that implementation of the right to payment between persons, which arises from the mechanisms of the EEG 2012, is not in any way ensured by State bodies and, in the event of dispute, is a matter for the civil courts.

32 In the third place, the Federal Republic of Germany submits that, as regards the role of the authorities in the special compensation scheme provided for by the EEG 2012, the task of the BAFA is limited to ruling on the requests for a cap that are submitted to it and to drawing up, under a circumscribed power which does not leave it any discretion, a decision which merely states, as the case may be, that the necessary conditions for obtaining entitlement to a cap are met. Thus, the BAFA does not have direct possession of financial flows generated by operation of the EEG 2012, nor does it have access to those resources or means of controlling them.

33 It should be recalled at the outset that, under Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

34 Article 107(1) TFEU makes that incompatibility subject to confirmation that four conditions have been met. First, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (see judgment of 15 July 2014 in *Pearle and Others*, C-345/02, EU:C:2004:448, paragraph 33 and the case-law cited).

35 With regard to the first of those conditions, settled case-law shows that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 107(1) TFEU. The distinction made in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (see judgment of 13 March 2001 in *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 58 and the case-law cited). Thus, the prohibition laid down in Article 107(1) TFEU may also cover, in principle, aid granted by public or private bodies established or designated by the State to administer aid (see, to this effect, judgment of 15 July 2004 in *Pearle and Others*, C-345/02, EU:C:2004:448, paragraph 34 and the case-law cited).

36 However, for advantages to be capable of being categorised as aid within the meaning of Article 107(1) TFEU, they must indeed, first, be granted directly or indirectly through State resources but also, secondly, be imputable to the State (see judgment of 15 July 2004 in *Pearle and Others*, C-345/02, EU:C:2004:448, paragraph 35 and the case-law cited). It is clear from the case-law that these are separate and cumulative conditions (see judgment of 5 April 2006 in *Deutsche Bahn* v *Commission*, T-351/02, EU:T:2006:104, paragraph 103 and the case-law cited).

37 As regards, the condition that the measure must be imputable to the State, it is settled case-law that it is necessary to examine whether the public authorities must be regarded as having been involved in the adoption of that measure (see, to this effect, judgment of 19 December 2013 in *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 17 and the case-law cited).

38 In the present instance, whilst the Federal Republic of Germany submits that the contested decision is vitiated by manifestly incorrect assessments of the facts, in its first plea its line of argument relates exclusively to the operation of the EEG 2012 and the State's role in that system.

39 In support of its first plea the Federal Republic of Germany merely explains the operation of the EEG 2012 by recalling the statutory provisions, but does not put forward any specific matter enabling the Court to find an error of fact in the description of the mechanisms at issue or a manifest error of assessment in the analysis of them.

40 Furthermore, in so far as the Federal Republic of Germany calls into question by its first plea whether the EEG 2012 is imputable to the State, it is clear that the support and compensation mechanisms at issue in the present case were established by law, here the EEG 2012, a fact which the Federal Republic of Germany indeed acknowledges when it refers in the application to a 'statutory framework'. Those mechanisms must therefore, pursuant to the case-law cited in paragraph 37 above, be regarded as imputable to the State.

41 Accordingly, contrary to the Federal Republic of Germany's contentions, it is not necessary to carry out a more detailed analysis of the State's role in the operation of the EEG 2012, as this question is covered by the appraisal of the condition relating to the commitment of State resources within the meaning of Article 107(1) TFEU, examined in the context of the third plea.

42 Therefore, the first plea must be dismissed.

Second plea: no advantage linked to the special compensation scheme

43 The Federal Republic of Germany submits, in essence, that the contested decision infringes Article 107(1) TFEU in that the Commission incorrectly considered that the special compensation scheme establishes an advantage for EIUs. The present plea is in five parts.

44 First of all, it should be noted, as the Commission has in its defence, that the arguments in the Federal Republic of Germany's second plea concern exclusively the very existence for EIUs of an advantage, for the purposes of Article 107(1) TFEU, that is linked solely to the special compensation scheme, and not the question of the selectivity of such an advantage or that of the existence of a selective advantage linked to the support scheme, questions which therefore should not be examined by the Court.

45 Also, the Court considers it expedient to begin by examining the first, second and fifth parts of the plea together, and then to examine the third part and, finally, the fourth part.

First, second and fifth parts

46 By the first part of the second plea, the Federal Republic of Germany contends that the special compensation scheme does not grant EIUs an advantage, but is intended to compensate for the reduction in their international competitiveness that is connected in particular with the fact that charges are markedly lower in other countries of the European Union, including the Member States where there is also a reduction in charges for EIUs. The Federal Republic of Germany adds that in third States there are often no comparable charges.

47 By the second part of the second plea, the Federal Republic of Germany submits that a large number of energy-intensive sectors, such as production or processing of copper, steel, aluminium or petroleum, are subject to very strong international competition. Thus, the special compensation scheme does not bring an advantage, but compensates for a disadvantage, in that, without that scheme, undertakings whose conditions of production are particularly energy-intensive would be in a very unfavourable competitive situation compared with undertakings in the same industry that are established in other Member States or in third States.

48 By the fifth part of the second plea, the Federal Republic of Germany submits that the special compensation scheme is justified in order to maintain the competiveness of German undertakings with particularly energy-intensive conditions of production. From this viewpoint, the special compensation scheme is an important instrument to ensure the same conditions of competition for energy-intensive German undertakings and to promote the transition to an energy supply founded on renewable resources. The Federal Republic of Germany further submits that the EIUs assisted by the special compensation scheme, which must demonstrate, in the procedure prescribed by Paragraph 41(1)(2) of the EEG 2012, that certification has taken place in which their energy consumption has been noted and assessed, must make considerable efforts as regards audits. The corresponding requirements also give rise to considerable costs. According to the Federal Republic of Germany, a greater reduction of the EEG surcharge in those cases constitutes appropriate compensation for the efforts regarding energy-resource management made by the undertakings concerned.

49 According to settled case-law, the definition of aid is more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges that are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see judgment of 7 March 2012 in *British Aggregates* v *Commission*, T-210/02 RENV, EU:T:2012:110, paragraph 46 and the case-law cited).

50 In order for a measure to be classified as State aid within the meaning of Article 107(1) TFEU, it is necessary in particular, first, that it involves an advantage, which may take various forms (aid granted 'in any form whatsoever'), and secondly, that that advantage derives, directly or indirectly, from public resources (aid granted 'by a Member State or through State resources').

51 It is in the light of those reminders of the case-law that it should be determined whether the cap on the EEG surcharge granted to EIUs entails, in itself, the grant to them of an advantage, within the meaning of Article 107(1) TFEU.

52 In the present instance, the Commission pointed out in recital 65 of the contested decision that Paragraphs 40 and 41 of the EEG 2012 grant EIUs a cap on the EEG surcharge and thereby prevent the TSOs and electricity suppliers from recovering the additional costs relating to EEG electricity from EIUs.

53 It must be found, as the Commission did in the contested decision, that Paragraph 40 of the EEG 2012 lays down the principle that the amount of the EEG surcharge which electricity suppliers may pass on to energy-intensive users is limited by providing that, upon request, the BAFA will issue an administrative act that prohibits the electricity supplier from passing on the totality of the EEG surcharge to an end-user when the end-user is an EIU. Paragraph 41 of the EEG 2012 makes the limitation of the EEG surcharge for EIUs subject to certain conditions, relating, principally, to the extent of their energy consumption.

54 It should also be pointed out that no argument has been put forward to contradict that finding, the Federal Republic of Germany itself acknowledging that the scheme established by those paragraphs is intended to limit the additional economic burden resulting, for EIUs, from the support for the production of EEG electricity and, therefore, mitigates the charges which are normally included in their budget.

55 Accordingly, the Commission did not commit an error of law in concluding, in the contested decision, that the special compensation scheme created by Paragraphs 40 and 41 of the EEG 2012 releases EIUs from a charge which they should normally bear and that, therefore, the existence of an advantage granted to EIUs, which results from the mere description of the mechanism set up by the EEG 2012, is established.

56 This conclusion is not called into question by the fact that, by that special compensation scheme, the Federal Republic of Germany seeks to compensate for a competitive disadvantage. According to settled case-law, the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid (see judgment of 3 March 2005 in *Heiser*, C-172/03, EU:C:2005:130, paragraph 54 and the case-law cited).

57 The first, second and fifth parts of the second plea should therefore be dismissed.

Third part

58 By the third part of the second plea, the Federal Republic of Germany maintains that, by using the special compensation scheme to cap the surcharges paid by EIUs, the German legislature seeks solely to compensate for structural disadvantages, so that it appears from the outset that there can be no advantage. In this regard, the Federal Republic of Germany submits that the General Court has already held that compensation of structural disadvantages is not an advantage for the purposes of the definition of aid in Article 107(1) TFEU.

59 It should be noted that, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see judgment of 2 September 2010 in *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited).

60 It should also be noted that the grounds underlying an aid measure do not suffice to exclude the measure at the outset from classification as aid within the meaning of Article 107 TFEU. Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (see judgment of 9 June 2011 in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 94 and the case-law cited).

61 It should therefore be held at the outset that the special compensation scheme created by Paragraphs 40 and 41 of the EEG 2012 cannot escape classification as State aid merely because a structural disadvantage is removed for EIUs by it.

62 On the assumption that, by its line of argument, the Federal Republic of Germany seeks to refer to the case-law relating to compensation for the services provided by undertakings responsible for a service of general economic interest in order to discharge public service obligations, such a measure must fulfil the criteria set out in the judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) if it is not to be caught by Article 107(1) TFEU (see, to this effect, judgment of 26 February 2015 in *Orange* v *Commission*, T-385/12, not published, EU:T:2015:117, paragraph 43 and the case-law cited).

63 Here, however, it is not apparent from the facts of the present case that EIUs are responsible for a service of general economic interest and must discharge public service obligations.

64 Moreover, the Federal Republic of Germany does not contend, in the third part of its second plea, that the criteria set out in the judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) are fulfilled in respect of the measures at issue.

65 The third part of the second plea should therefore be dismissed.

Fourth part

66 By the fourth part of the second plea, the Federal Republic of Germany submits that the special compensation scheme observes the ability-to-pay principle, in that the German Government hopes that, by reducing the EEG surcharge for energy-intensive undertakings, those undertakings will be able to be kept in Germany and will thus provide at least some contribution to the EEG surcharge.

67 It should be pointed out at the outset that, by its general and abstract line of argument relating to observance of the 'ability-to-pay principle', the Federal Republic of Germany merely asserts, in essence, that if EIUs had been burdened with the EEG surcharge at the full rate, they could have relocated their production abroad and, by so doing, would no longer have contributed to the financing of the funds generated by that surcharge. The Federal Republic of Germany does not, however, adduce any evidence in support of that line of argument. In particular, it does not demonstrate that it took individual account of the financial situations of the undertakings which benefit from the cap on the EEG surcharge or that, but for the cap, they would in fact have relocated their production.

68 Furthermore, on the assumption that, by its line of argument relating to the ability-to-pay principle, the Federal Republic of Germany seeks to refer to the case-law according to which the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the general scheme of the system of which they form part (see, to this effect, judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 145 and the case-law cited), that line of argument is unconvincing. It has not shown that the differentiation between undertakings regarding charges is actually justified by the nature and general scheme of the system in question, as the case-law requires (see, to this effect, judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 146 and the case-law cited).

69 The fourth part of the second plea should therefore be dismissed.

70 It follows from all the foregoing that the second plea, alleging that there is no advantage linked to special compensation scheme, must be dismissed.

Third plea: no advantage financed through State resources

71 The Federal Republic of Germany submits, in essence, that the contested decision infringes Article 107(1) TFEU in that the Commission wrongly took the view that the operation of the EEG 2012 involves State resources, whereas, in its submission, the findings in the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160) do not permit it to be accepted in the present case that there is State aid, as regards both the support scheme and the compensation scheme. The EEG 2012 is said to be, like what the Court of Justice held in relation to the legislative provisions at issue in the case giving rise to the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160), legislation of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity and, secondly, allocates the financial burden resulting from that obligation amongst those electricity supply undertakings and upstream private electricity network operators.

72 In the first place, the Federal Republic of Germany contends that the system under the EEG 2012 is not connected with the budget of the State or of a public body, so that the involvement of State resources is precluded.

73 In that regard, first of all the Federal Republic of Germany asserts that the legislation relating to the system under the EEG 2012 provides neither for the financing of aid for renewable energy by State resources nor for imputability to the State. It adds that, according to the case-law, payments between individuals which are ordered by the State without being imputable to the budget of the State or of another public body and in respect of which the State does not relinquish any resources, in whatever form (such as taxes, duties, charges and so on), retain their private-law nature.

74 Next, the Federal Republic of Germany submits that it is also apparent from the case-law that charges, taxes and fees are characterised by the fact that the revenue generated must, in one form or another, flow into the budget of the State or of a public body. That is precisely not so in the case of the EEG 2012. The TSOs are not public bodies and the sums which they are paid to cover the costs resulting from the sale on an exchange of the electricity produced from renewable sources do not in any way reduce, directly or indirectly, State revenue.

75 Finally, the Federal Republic of Germany contends that the fact that the EEG surcharge is not attributed to the federal budget or the budget of a public body also results from the fact that any surplus or deficit of the TSOs must be offset, with interest, the following year when the EEG

surcharge is set, corresponding to what applies in civil law in the case of a claim for reimbursement of expenses. In this regard, it adds that any disputes arising from the amount payable pursuant to the system of financing under the EEG 2012 fall within the jurisdiction of the civil courts, and the administrative authorities have no influence over the handling of those disputes.

76 In the second place, the Federal Republic of Germany submits, in essence, that the mechanism of the EEG 2012 does not provide for State supervision of the use made of the resources generated by the EEG surcharge. Whilst the EEG 2012 admittedly lays down a series of supervisory tasks for checking that the mechanisms set up by the private bodies in performing the legal requirements are valid, lawful and operate properly, the fact remains, according to the Federal Republic of Germany, that the State bodies to which those tasks fall do not have competence to influence payments or financial flows and have no power over the financial resources utilised by the various parties involved in the system. It relies, principally, on the judgment of 15 July 2004 in *Pearle and Others* (C-345/02, EU:C:2004:448).

77 First of all, the Federal Republic of Germany asserts that the supervisory tasks of the BNetzA concern for the most part implementation of the provisions relating to the EEG surcharge that electricity suppliers may demand from final consumers. According to the Federal Republic of Germany, the BNetzA may intervene only if the setting of the EEG surcharge infringes the standards laid down, by the inclusion for example of costs that cannot be incorporated into the EEG surcharge.

78 Next, the Federal Republic of Germany maintains that the statutory imposition of a calculation method and the obligations of transparency and associated rights of supervision serve merely to prevent enrichment of an economic operator at some point in the chain.

79 Finally, the Federal Republic of Germany contends that the Commission committed an error of law in the contested decision by assuming that regulation and supervision make private flows of money State aid within the meaning of Article 107 TFEU. It submits that the Court of Justice has held that there are no State resources where influence of the State over use of the resources is sufficiently ruled out.

80 In the third place, the Federal Republic of Germany states that the arguments which are set out in the first two parts of the third plea, and which focus principally on the issue of involvement of State resources in operation of the support scheme, apply by analogy to the special compensation scheme.

81 By way of preliminary points, first, it is to be recalled that, according to settled case-law, only advantages which are granted directly or indirectly through State resources are to be regarded as aid within the meaning of Article 107(1) TFEU. It follows from the very wording of that provision and from the procedural rules laid down in Article 108 TFEU that advantages granted from resources other than State resources do not fall within the scope of the provisions in question. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State (see, to this effect, judgments of 22 March 1977 in *Steinike & Weinlig*, 78/76, EU:C:1977:52, paragraph 21, and of 17 March 1993 in *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 19 and the case-law cited). EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid (judgment of 16 May 2002 in *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 23).

82 Secondly, it should be pointed out that it is not necessary to establish in every case that there has been a transfer of State resources in order for the advantage granted to one or more undertakings to be capable of being regarded as State aid within the meaning of Article 107(1) TFEU (see judgment of 16 May 2002 in *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 36 and the case-law cited).

83 Indeed, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (see judgment of 16 May 2002 in *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 37 and the case-law cited).

84 In the present instance, the Commission took the view in the contested decision that, through the EEG 2012, the Federal Republic of Germany introduced a special levy, the EEG surcharge, and defined its purpose, which is the financing of the difference between the costs that TSOs incur in purchasing EEG electricity and the revenue they generate from selling this electricity. The Commission found that the calculation method for determining the level of the EEG surcharge was also set in the EEG 2012, as was the principle that deficits and surpluses are corrected in the following year, thereby ensuring that TSOs incur no losses, but also implying that they cannot use the revenue from the surcharge for anything other than the financing of EEG electricity. The Commission concluded that, unlike in the case giving rise to the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160), the State had, within the framework of the EEG 2012, provided TSOs with the required financial resources to finance the support for EEG electricity.

85 The Commission relied on four series of arguments in the contested decision in order to support that conclusion.

86 First, the Commission took the view, in recitals 112 to 116 of the contested decision, that, as the EEG surcharge was introduced by the State and the State designated the TSOs to administer the funds, the mere fact that the advantage is not financed directly from the State budget is not sufficient to exclude that State resources are involved. In that regard, the Commission stated that it is settled case-law that the entities designated to administer the aid can be either public or private bodies; therefore, the fact that the TSOs may be private operators cannot as such exclude the existence of State resources, and neither can the originally private nature of the resources collected.

87 Secondly, in recitals 117 and 118 of the contested decision the Commission relied on the designation of the TSOs to administer the EEG surcharge in order to demonstrate that State resources were involved in the system set up by the EEG 2012. The Commission adhered to the preliminary conclusions set out in the decision to initiate the formal investigation procedure and found that the TSOs had to:

— purchase EEG electricity produced in their area either directly from the producer when it was directly connected to the transmission line or from DSOs at feed-in tariffs, or pay the market premium (as a result the EEG electricity as well as the financial burden of the support provided for by the EEG 2012 were centralised at the level of each of the four TSOs);

— apply the ‘green electricity privilege’ to suppliers which asked for it and fulfilled the relevant conditions, set out in Paragraph 39(1) of the EEG 2012;

— equalise between themselves the amount of EEG electricity so that each of them purchased the same proportion of EEG electricity;

— sell the EEG electricity on the spot market under rules defined in the EEG 2012 and its implementing provisions, which could be done jointly;

— jointly calculate the EEG surcharge, which had to be the same for each kWh consumed in Germany, as the difference between revenue from the sale of EEG electricity and expenditure linked to the purchase of EEG electricity;

— jointly publish the EEG surcharge in a specific format on a joint website;

— publish aggregate information on the EEG electricity;

— compare the forecasted EEG surcharge with what it should really have been in a given year and adapt the surcharge for the following year;

— publish forecasts for several years in advance;

— collect the EEG surcharge from electricity suppliers;

— (each) record all financial flows (expenditure and revenue) linked to the EEG 2012 in separate bank accounts.

88 The Commission inferred from this that the TSOs did not just settle private claims between themselves, but were implementing their legal obligations under the EEG 2012.

89 Thirdly, the Commission found, in recitals 119 to 122 of the contested decision, that the TSOs were being strictly monitored by the State as regards administration of the EEG surcharge. According to the Commission, that monitoring is performed by the BNetzA, which also has the necessary enforcement powers. In the Commission's view, the BNetzA in particular monitors the way in which the TSOs sell on the spot market the EEG electricity for which feed-in tariffs are paid and checks that TSOs properly determine, set and publish the EEG surcharge, that TSOs properly charge electricity suppliers for the EEG surcharge, that feed-in tariffs and premiums are properly charged to the TSOs, and that the EEG surcharge is reduced only for electricity suppliers fulfilling the conditions of Paragraph 39 of the EEG 2012. The Commission also found that the BNetzA receives information from the TSOs on the support for EEG electricity and on the charging of the suppliers and that, finally, it can set fines and adopt decisions, including decisions influencing the level of the EEG surcharge.

90 Fourthly, the Commission found, in recitals 123 to 138 of the contested decision, that there is, in the context of the operation of the EEG 2012, general State control resulting from the fact that the State organises a transfer of financial resources through legislation and establishes for what purposes those financial resources may be used. According to the Commission, which relies in particular on the judgment of 19 December 2013 in *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851), the decisive element is that the State has created a system where the costs incurred by the TSOs are fully compensated by the EEG surcharge and where the electricity suppliers are empowered to pass on the EEG surcharge to final consumers. The Commission observed that State control over the resources does not mean that there have to be flows from and to the State budget involving the respective resources, but that, in order for the State to exercise control over the resources, it is enough that, as in this instance, it fully regulates what is supposed to happen in the event of a deficit or a surplus in the account relating to the EEG surcharge.

91 In the present case, it must be determined, in the light of the arguments raised by the Federal Republic of Germany, whether the Commission was correct in finding in the contested decision that the EEG 2012 involves State resources within the meaning of Article 107(1) TFEU.

92 At the outset, it must be observed that it is not in dispute that, as has been noted in paragraphs 2 to 12 above, the EEG surcharge, collected and administered by the TSOs, is intended ultimately to cover the costs generated by the feed-in tariffs and market premium provided for in the EEG 2012 by guaranteeing producers of EEG electricity a price for the electricity they produce that is above the market price. Therefore, the EEG surcharge must be considered to result, principally, from implementation of a public policy, laid down by the State through legislation, to support producers of EEG electricity.

93 In the first place, it should be noted that in the present instance the TSOs are entrusted by the EEG 2012 with managing the system for supporting the production of electricity from renewable sources. As the Commission correctly found (see paragraphs 87 and 88 above), the EEG 2012 clearly confers on the TSOs a series of obligations and rights as regards implementation of the mechanisms resulting from that law, so that the TSOs are the central point in the operation of the system laid down by it. The tasks for the management and administration of that system, laid down in particular by Paragraphs 34 to 39 of the EEG 2012, can be assimilated, from the point of view of their effects, to a State concession. Indeed, the funds involved in the operation of the EEG 2012 are administered exclusively for purposes in the general interest, in accordance with detailed rules defined beforehand by the German legislature. Those funds, consisting in the additional costs passed on to the final consumers and paid by electricity suppliers to the TSOs for the EEG electricity whose price exceeds that of electricity bought on the market, do not pass directly from the final consumers to the producers of EEG electricity, that is to say, between autonomous economic operators, but require the intervention of intermediaries, entrusted in particular with their collection and administration. It should be pointed out in particular that the funds are not paid into the TSOs' general budget or freely available to them, but are subject to separate accounting and allocated exclusively to the financing of the support and compensation schemes, to the exclusion of any other purpose. Thus, contrary to the assertions of the Federal Republic of Germany, the situation of the TSOs in the case at issue displays points in common with the situation of Samenwerkende ElektriciteitsProduktiebedrijven NV in the case giving rise to the judgment of 17 July 2008 in *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413) and with that of Abwicklungsstelle für Ökostrom AG in the case giving rise to the judgment of 11 December 2014 in *Austria* v *Commission* (T-251/11, EU:T:2014:1060).

94 Accordingly, it must be held that the funds generated by the EEG surcharge and administered collectively by the TSOs remain under the dominant influence of the public authorities in that the legislative and regulatory provisions governing them enable the TSOs, taken together, to be assimilated to an entity executing a State concession.

95 In the second place, it is clear that the resources at issue in the present instance, generated by the EEG surcharge and intended to finance both the support scheme for EEG electricity and the compensation scheme, are obtained by means of charges ultimately imposed on private persons by the EEG 2012. Paragraph 37 of the EEG 2012 provides, on account of the obligation imposed by that law on NOs to make an additional payment or pay a market premium to producers of EEG electricity, that the TSOs may impose a price supplement on suppliers, which may then pass it on to the final customers in accordance with the detailed rules, in particular regarding transparency of bills, defined by the legislature. It is not disputed that electricity suppliers in practice pass on the financial burden resulting from the EEG surcharge to the final customers (see paragraph 9 above), in order to recover the costs brought about by the expenditure linked to that obligation. It should, moreover, be observed that that burden, which for EIUs is capped in accordance with the detailed rules noted in paragraph 11 above, represents, as the Federal Republic of Germany acknowledged at the hearing, 20% to 25% of the total amount of an average final consumer's bill. Having regard to the extent of that burden, its passing on to final consumers must therefore be regarded as a consequence foreseen and organised by the German legislature. It is thus indeed on account of the EEG 2012 that final electricity consumers are, *de facto*, required to pay that price supplement or additional charge. It is a charge that is unilaterally imposed by the State in the context of its policy to support producers of EEG electricity and can be assimilated, from the point of view of its effects, to a levy on electricity consumption in Germany. Indeed, that charge is imposed by a public authority, for purposes in the general interest, namely protection of the climate and the environment by ensuring the sustainable development of energy supply and developing technologies for producing EEG electricity, and in accordance with the objective criterion of the quantity of electricity delivered by suppliers to their final customers (see, by analogy, judgment of 17 July 2008 in *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraphs 43 to 47). As the Commission points out in recital 99 of the contested decision, the State has not only defined to whom the advantage is to be granted, the eligibility criteria and the level of support, but it has also provided the financial resources necessary to cover the costs of the support to

EEG electricity. Furthermore, in contrast to the factual circumstances of the case giving rise to the judgment of 30 May 2013 in *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348), it has not been maintained by the Federal Republic of Germany, nor is there anything in the case file to indicate, that the initiative to impose the charge, by means of the measure at issue, was taken by entities liable to pay it, that the TSOs act solely as an instrument in an arrangement which those entities themselves envisaged or that they themselves decided on the use of the financial resources thereby generated.

96 Accordingly, the sums at issue, which are generated by the EEG surcharge, are levied on final electricity consumers and originate in the obligation, imposed by the EEG 2012 on NOs, to make an additional payment or pay a market premium to producers of EEG electricity, are to be classified as funds which involve a State resource and can be assimilated to a levy (see, by analogy, judgments of 17 July 2008 in *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 66, and of 11 December 2014 in *Austria* v *Commission*, T-251/11, EU:T:2014:1060, paragraph 68). In any event, those funds cannot be regarded as the TSOs' own resources for which the State simply prescribed, by a legislative measure, a particular use, as the funds, as the Commission points out in recital 128 of the contested decision, are not at any time freely available to the TSOs.

97 It should also be noted that it is settled case-law that, in order for a levy, such as that at issue, to be capable of being regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the levy is necessarily allocated for the financing of the aid (see, to this effect, judgment of 15 June 2006 in *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 46 and the case-law cited). In the present case, it is not in dispute that the levy collected by the TSOs, through the EEG surcharge, is hypothecated to the aid measure supporting the production of EEG electricity.

98 So far as concerns the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160), which the Federal Republic of Germany seeks to rely on, it should be observed that, in order to preclude classification as State aid within the meaning of Article 107(1) TFEU, the Court of Justice relied, in essence, on the fact that the German legislation at issue in the case giving rise to that judgment, which, first, required private electricity supply undertakings to purchase EEG electricity at prices higher than its real economic value and, secondly, allocated the ensuing financial burden between the electricity supply undertakings and upstream private electricity network operators, did not display elements from which it could have been inferred that there was a direct or indirect transfer of State resources. That being so, the Court of Justice held that the fact that the legislation conferred an undeniable advantage on undertakings producing EEG electricity and that such an advantage was the consequence of the intervention of the public authorities was not sufficient for the measure at issue to be classified as aid.

99 It is apparent, however, from analysis of the factual background of the case giving rise to the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160) that, unlike the German measure forming the subject matter of the present proceedings, the mechanism laid down by the previous German law provided neither for the additional costs to be expressly passed on to final consumers nor for the intervention of intermediaries entrusted with the collection or administration of the sums constituting aid and, therefore, did not provide for entities comparable, in their structure or their role, to the TSOs taken together.

100 Unlike in the present case, the advantage analysed by the Court of Justice in the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160) consisted in the guarantee, in favour of the beneficiary undertakings, of being able to resell all the energy produced from renewable resources and in the fact that the selling price exceeded the market price, without any scheme for the financing of that price supplement — by means of a charge that can be assimilated to a levy on electricity consumption, the amount of which is identical for each kWh of electricity supplied to a final customer — being set up.

101 Furthermore, in the case giving rise to the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160), the private undertakings were not, as in the present case, appointed by the Member State concerned to manage a State resource, but were only bound by an obligation to purchase by means of their own financial resources (see, to this effect, judgment of 19 December 2013 in *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 35). In the present case, it is not in dispute that the obligation on the TSOs that additional payment be made to producers of EEG electricity is not satisfied by means of the TSOs' own financial resources, but by means of the funds generated by the EEG surcharge, administered by the TSOs and allocated exclusively to financing the support and compensation schemes set up by the EEG 2012.

102 Thus, the funds at issue in the case giving rise to the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160) could not be considered a State resource since they were not at any time under public control and there was no mechanism, such as that at issue in the present case, established and regulated by the Member State, for offsetting the additional costs arising from that obligation to purchase and through which the State offered those private operators the certain prospect that the additional costs would be covered in full (see, to this effect, judgment of 19 December 2013 in *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 36).

103 Moreover, it is also apparent from analysis of the factual background of the case giving rise to the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160) that, unlike the German measure forming the subject matter of the present proceedings, the system created by the previous German law did not provide for a mechanism comparable to the special compensation scheme, by which the EEG surcharge that electricity suppliers can pass on to EIUs is capped.

104 It follows from the foregoing that the system set up by the Federal Republic of Germany in the case at issue is substantially different from the system at issue in the case giving rise to the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, EU:C:2001:160), in the light, in particular, of the detailed rules governing the administration, use, levying and allocation of the funds at issue.

105 In the third place, it is admittedly not in dispute that the TSOs are, for the most part, entities in the form of public limited companies governed by private law. However, that cannot be considered sufficient, in the particular circumstances of the case, to set aside the conclusion that State resources are present in the context of the measures resulting from the EEG 2012.

106 As has been pointed out in paragraphs 93 and 94 above, the TSOs are entrusted, in addition to the responsibilities inherent in their main activity, with managing the system of aid for the production of EEG electricity. They are, moreover, monitored when performing that task, as the Commission notes in recital 107 of the contested decision, so that they are unable to use the funds collected in the context of the measure at issue — which are paid to them by the suppliers covered by that measure — for purposes other than those laid down by the German legislature. That being so, it must be held that, in the context of performance of the tasks falling to them under the EEG 2012, the action of those bodies is not that of an economic entity acting freely on the market for the purpose of making a profit, but an action defined by the German legislature, which circumscribed it so far as the performance of those tasks is concerned.

107 In that regard, it should be added that the TSOs are under an obligation to administer the sums obtained pursuant to the measure at issue in a specific joint account subject to control by State authorities, as is apparent, in particular, from Paragraph 61 of the EEG 2012. That, when analysed with the specific powers and obligations conferred on the TSOs by the EEG 2012, constitutes a further indication that the funds in question are not funds corresponding to normal resources belonging to the private sector, which would be fully available to the undertaking administering them,

but special resources, the use of which for strictly defined purposes was laid down in advance by the German legislature (see, by analogy, judgment of 27 January 1998 in *Ladbroke Racing* v *Commission*, T-67/94, EU:T:1998:7, paragraphs 106 to 108).

108 More specifically, monitoring of the TSOs by State bodies is carried out at various levels. First, monitoring is carried out by the BNetzA. Under Paragraph 61 of the EEG 2012, the BNetzA must in particular, within the framework of its supervisory tasks, check that the TSOs sell EEG electricity in accordance with Paragraph 37 of the EEG 2012 and establish, set, publish and charge electricity suppliers the EEG surcharge in compliance with the legislative and regulatory requirements.

109 Secondly, under Paragraph 48 of the EEG 2012, the BNetzA is presented by the TSOs with the data used for the compensation mechanism.

110 The existence of such strict monitoring of compliance of the TSOs' activities with the legislative framework laid down, even when carried out retroactively, falls within the general approach of the overall structure provided for in the EEG 2012. That monitoring thus corroborates the conclusion, drawn in particular from the powers accorded to those entities, and adopted in the light of their tasks and obligations, that the TSOs do not act freely and on their own behalf, but as administrators of aid granted through State funds. Even if the monitoring to which the TSOs are subject has no direct effect on the day-to-day administration of the funds in question, the fact remains that it is indeed an additional factor designed to ensure that the TSOs' activities do indeed remain circumscribed within the framework laid down in the EEG 2012.

111 Accordingly, it must be held that the Commission was correct in maintaining, in recital 138 of the contested decision, read in conjunction with recitals 98 to 137, that the advantage provided for by Paragraphs 16 to 33i of the EEG 2012 for producers of EEG electricity through the feed-in tariffs and market premiums is akin, in the present instance, to a levy set by the State authorities involving State resources in that the State organises a transfer of financial resources through legislation and establishes for what purposes those financial resources may be used.

112 That conclusion also applies to the advantage for the energy-intensive users consisting of the EIUs in that, as the Commission correctly pointed out in recital 114 of the contested decision, the compensation mechanism laid down by the EEG 2012 constitutes an additional burden for the TSOs. Any reduction in the amount of the EEG surcharge has precisely the effect of reducing the amounts collected by electricity suppliers from EIUs and may be regarded as leading to losses in revenue for the TSOs. However, those losses are subsequently recovered from other suppliers and, *de facto*, from other final customers, in order to offset the losses thus incurred, as the Federal Republic of Germany indeed confirmed at the hearing in reply to a question from the Court. Thus, the average final consumer in Germany is involved, in a certain way, in the subsidising of the EIUs for which the EEG surcharge is capped. Moreover, the fact that final electricity consumers who are not EIUs must bear additional costs caused by the capping of the EEG surcharge for EIUs is a further indication, when analysed with the foregoing reasoning, that the funds generated by the EEG surcharge are indeed special resources, equivalent to a levy on electricity consumption, the use of which for strictly defined purposes was laid down in advance by the German legislature within the framework of implementation of a public policy and not of a private initiative.

113 Those conclusions are not invalidated by the other arguments put forward by the Federal Republic of Germany.

114 In so far as the Federal Republic of Germany also bases its line of argument on the alleged similarity of the factual and legal circumstances of the present case with those of the case giving rise to the judgment of 30 May 2013 in *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348), it is clear that those circumstances may be distinguished from the circumstances of the present dispute.

115 In the case giving rise to the judgment of 30 May 2013 in *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348), the question referred to the Court of Justice was that of the legality, in the light of State aid law, of a decision of the competent national authorities extending on a compulsory basis to all traders in the agricultural industry of turkey farming and production an agreement, made within the inter-trade organisation representing that industry, introducing the levying of a contribution for the purposes of financing common activities decided on by that organisation.

116 In paragraph 36 of the judgment of 30 May 2013 in *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348), the Court of Justice stated that the national authorities cannot actually use the resources resulting from the contributions at issue to support certain undertakings inasmuch as it is the inter-trade organisation that decides how to use those resources, which are entirely dedicated to pursuing objectives determined by that organisation.

117 By contrast, in the present case, it is not in dispute that the TSOs cannot freely decide how to use the resources generated by the EEG surcharge and devote them, as the case may be, to objectives that they would determine themselves. Under the EEG 2012, the TSOs are required to administer the EEG surcharge with a view solely to remunerating producers of EEG electricity. They must record all financial flows (expenditure and revenue) linked to the EEG 2012 in a joint bank account separate from their own accounting and compare the EEG surcharge collected with what it should really have been in a given year in order to adapt the surcharge for the following year, so as to preclude any positive or negative balance in the bank account used to manage the financial flows linked to the EEG 2012. Thus, it cannot be disputed, in the present case, that the objectives pursued by the EEG 2012, that is to say, principally the support for producers of EEG electricity but also the support for EIUs, are, in contrast to the situation in the case giving rise to the judgment of 30 May 2013 in *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348), entirely determined by the State by means of the laws and regulations adopted on its initiative alone.

118 Accordingly, the fact that the State does not have actual access to the resources generated by the EEG surcharge, in the sense that they indeed do not pass through the State budget, does not affect, in the present instance, the State's dominant influence over the use of those resources and its ability to decide in advance, through the adoption of the EEG 2012, which objectives are to be pursued and how those resources in their entirety are to be used.

119 So far as concerns the judgments of 14 January 2015 in *Eventech* (C-518/13, EU:C:2015:9) and of 16 April 2015 in *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235), relied upon by the Federal Republic of Germany in its reply, it should be noted that the Court of Justice held in those judgments that, for the purposes of determining the existence of State aid within the meaning of Article 107(1) TFEU, it is necessary to establish a sufficiently direct link between, on the one hand, the advantage given to the beneficiary and, on the other, a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget.

120 However, the judgments of 14 January 2015 in *Eventech* (C-518/13, EU:C:2015:9) and of 16 April 2015 in *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235) relate to different factual circumstances. Moreover, the Court has already held that the expression 'aid' necessarily implies advantages granted directly or indirectly through State resources or constituting an additional charge for the State or for bodies designated or established for that purpose (see judgment of 1 December 1998 in *Ecotrade*, C-200/97, EU:C:1998:579, paragraph 35 and the case-law cited). In that regard, it is clear from settled case-law, recalled in paragraph 35 above, that no distinction should be drawn according to whether the aid is granted directly by the State or by a public or private body designated or established by the State. Since, in the present case, the TSOs were designated to administer collectively the EEG surcharge and it falls to them to manage the financial flows brought about by operation of the mechanisms resulting

from the EEG 2012, the Federal Republic of Germany's line of argument that the scheme supporting the production of EEG electricity does not impose a burden on the State budget does not mean that State resources are not involved in the present case.

121 Nor are those conclusions invalidated by the other contentions of the Federal Republic of Germany.

122 First of all, the contention to the effect that any overpayment of the EEG surcharge would not in any event accrue to the State budget should be rejected. It is true that it follows from the very operation of the EEG 2012 that, as the parties all acknowledge, any surplus or deficit of the TSOs resulting from the EEG surcharge must in any event be offset, with interest, the following year when the EEG surcharge is set. That offsetting year by year, required by the EEG 2012, means that there ultimately cannot be any surplus or deficit in the TSOs' accounts for administering the EEG surcharge, so that it is necessarily not possible for any overpayment of the EEG surcharge to accrue to the State budget. However, as has been established in paragraph 111 above, the involvement of State resources in the present case results from the very fact that the State organises a transfer of financial resources through legislation and establishes for what purposes those financial resources must be used, and not from the existence of close links with the State budget.

123 In any event, it is apparent from the analysis of the EEG 2012 in paragraphs 92 to 112 above that, in principle, the measure at issue provides for uninterrupted access of the TSOs to the funding necessary to perform the tasks in the general interest which they are assigned for the carrying out of their functions and which are intended to implement a policy set by the State. That merely reinforces the conclusion that the TSOs do not act as typical undertakings on the market, bearing all the normal risks and hazards, including financial risks, but as special entities whose role is strictly defined by the legislation at issue.

124 Next, it is also necessary to reject the Federal Republic of Germany's contentions that (i) the measure at issue does not provide for a link with the budget of the State or the budget of a public body, (ii) neither the BNetzA nor the State, in a broader sense, determines the precise amount of the EEG surcharge, (iii) the BAFA's role does not mean that the resources used for the special compensation scheme are State resources and (iv) any judicial proceedings connected with the system for the EEG surcharge are dealt with, in accordance with the measure at issue, under the normal civil procedure and not the administrative procedure.

125 It has already been stated that the funds at issue must be classified from the outset as State funds, in particular because final consumers are required to pay a price supplement that can be assimilated to a levy for implementation of a policy set by the State. Also, it has been pointed out that the TSOs act, so far as concerns performance of the tasks falling to them, within a framework clearly defined by the German legislature. They are, moreover, strictly monitored by the competent German administrative bodies. Funds financed through compulsory contributions imposed by the legislation of the Member State, administered and apportioned in accordance with that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are administered by entities separate from the public authorities. Indeed, it has already been held that a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity, at a price higher than the market price that is financed by all final consumers of electricity in the national territory, such as that provided for in the French legislation analysed in the case in point, constitutes an intervention through State resources (see, to this effect, judgment of 19 December 2013 in *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 25 and the case-law cited, and, by analogy, paragraph 26).

126 Finally, it is also necessary to reject the Federal Republic of Germany's contentions put forward at the hearing to the effect that the cap on the EEG surcharge granted to EIUs amounts to a differential pricing practice known to economists as 'Ramsey pricing', or to a cross-subsidy between small and large electricity consumers. It is true that the very existence of the EEG surcharge results from policy

choices and its level cannot be influenced by consumers, so that its level may be higher, as a proportion of the final bill, for small consumers, who, from the point of view of demand, are less sensitive than EIUs to changes in the price of electricity. However, it is settled case-law that operating aid is aid which is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities (see, to this effect, judgment of 16 October 2014 in *Alcoa Trasformazioni* v *Commission*, T-177/10, EU:T:2014:897, paragraph 92 and the case-law cited). Therefore, the cap at issue, which permits EIUs to reduce the costs connected with their electricity consumption, which by definition falls within day-to-day management, amounts to operating aid involving, as has been demonstrated in particular in paragraphs 95 and 96 above, the existence of State resources.

127 It follows from that analysis that the mechanisms under the EEG 2012 result, principally, from implementation of a public policy, laid down through the EEG 2012 by the State, to support producers of EEG electricity and that, first, the funds generated by the EEG surcharge and administered collectively by the TSOs remain under the dominant influence of the public authorities, secondly, the amounts in question, generated by the EEG surcharge, are funds which involve a State resource and can be assimilated to a levy and, thirdly, it may be concluded from the powers and tasks given to the TSOs that they do not act freely and on their own behalf, but as administrators, assimilated to an entity executing a State concession, of aid granted through State funds.

128 It follows from all the foregoing that the Commission was correct in finding in the contested decision that the EEG 2012 involves State resources within the meaning of Article 107(1) TFEU.

129 Consequently, the third plea, and the action in its entirety, should be dismissed.

Costs

130 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders the Federal Republic of Germany to pay the costs.

Papasavvas Bieliūnas Forrester

Delivered in open court in Luxembourg on 10 May 2016.

[Signatures]